

Improving Kids' Environment

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April 16, 2009

Compliance and Enforcement Response Policy
MP-005-R1_NPD
Nancy King
Office of Legal Counsel
Indiana Department of Environmental Management
100 North Senate Avenue
Indianapolis, IN 46204
Fax: 317-233-2342

Re: MP-005-R1_NPD; Compliance and Enforcement Response Policy

Dear Ms. King:

Improving Kids' Environment, Inc. appreciates the opportunity to comment on the Nonrule Policy Document MP-005-R1_NPD, the Compliance and Enforcement Response Policy (CERP). IKE is a not for profit organization based in Central Indiana that seeks to reduce environmental threats to children's health. This policy makes significant changes to the one adopted in 2003, changes that IKE believes are inconsistent with federal guidance and will lead to less compliance by regulated industries with Indiana's environmental requirements.

Process Concerns. IKE is concerned about the process IDEM has used to develop this policy. The CERP dated March 2, 2009, purports to replace the policy of October 31, 2008. Yet as far as we can ascertain, the October 2008 version was never presented to the environmental boards as required by IC 13-14-1-11.5 or made available for public comment. IKE also questions the signatures on the March 2, 2009 version. Indiana law requires that NRPDs be made available for public review and comment and presentation to the boards before being made final and effective, yet the Commissioner's signature on the document, dated March 2, 2009, suggests, at the least, that the Commissioner himself has made a final determination on the policy before that public review period has occurred and that the legally required reviews by the public and the environmental boards are symbolic rather than a meaningful opportunity for the agency to review input about the policy.

In addition, the agency has made the revised policy very difficult for the public to review by not providing either a version that shows the changes between the 2003 policy and this one or a narrative explanation of the reason for the changes. This difficulty was exacerbated by the fact that the 2003 policy was not available on the agency website. If the agency wishes to reconsider and

change a prior policy, well and good, but it is fair to expect an explanation for those changes and how the revised policy will achieve the expressed goal—environmental compliance.

Comments on the Policy.

- The policy does not comply with the USEPA Policy on Timely and Appropriate Enforcement Response to High Priority Violations, the guidance document that establishes federal requirements regarding enforcement of violations of the federal Clean Air Act. This policy applies to IDEM as the delegated agency implementing the Clean Air Act in Indiana. The guidance document defines a number of violations as “high priority violations.”—Once a high priority violation has been identified at a source, the federal guidance requires that formal enforcement be initiated, through the issuance of a Notice of Violation, within 60 days. See www.epa.gov/compliance/resources/policies/civil/caa/stationary/issue-ta-rpt.pdf, page 11. IDEM’s policy, by contrast, does not establish any class or type of violation for which formal enforcement action is automatically required. In §6.4.1, the policy states that “whenever appropriate, the compliance manager shall seek to issue to a regulated entity the most informal enforcement action available in an effort to promote the expeditious return to compliance by that regulated entity.” And even for Class I violations, which are the most egregious and include high priority violations, what the policy calls for is “immediate referral to the program Assistant Commissioner for consideration of initiation of the formal enforcement process.” (emphasis added).
- The policy requires that all violations be reviewed by the Assistant Commissioner of the appropriate IDEM program office for a determination of whether formal enforcement should be initiated. Not only is this inefficient, given the demands of day to day work, but it means that decisions on how to handle individual violations are being made by political appointees rather than by technical staff trained in these issues. This is likely to lead to less consistent decisions rather than more. Almost 20 years ago, IDEM created an Office of Enforcement, transferring the decision to take enforcement from the Assistant Commissioners to a single manager for the very reason that having each case go through three layers of management and compete for the Assistant Commissioner’s time with other daily decisions such as permits was inefficient and ineffectual. The agency also recognized then that because enforcement is discretionary, it was often delayed, undercutting the deterrence of swift action for violations. Coupled with the preference for informal enforcement laid out in the policy, eliminating the Office of Enforcement and routing enforcement actions to the program ACs is not to make the process more efficient, as IDEM has stated publicly, but will de-emphasize use of enforcement in situations where it is appropriate and, quite possibly, required by federal guidance.
- Performing a regulated activity without a permit should be a Class I violation, whether or not there is a threat to human health or the environment; IDEM should strike “that results in a threat to human health or the environment” from § 6.2.1.A.1.b. Obtaining a permit is the basis for assuring environmental protection in the state. Failure to do so is, and should be considered by IDEM to be, a serious violation. For the same reason, IDEM should delete §6.2.1.B.1.b.
- *Formal vs. informal enforcement.* The policy defines “Formal Enforcement Process” as “a review of noncompliance, determination of appropriate enforcement measures and implementation of those measures.” In addition, it defines “Enforcement action” as “the

issuance of either a Violation Letter or Notice of Violation (NOV) issued by an IDEM program area, or a referral to the Attorney General or USEPA for a violation. Enforcement actions may result in either an informal action or formal Agency enforcement response by IDEM." Further, in §6.4.1, it states, as noted above, that the compliance manager shall employ "the most informal enforcement action available" to bring the source back into compliance. The notions of *formal* and *informal* enforcement action seem to be intertwined. A clear explanation of which types of actions are formal and which are informal would make the policy clearer.

- Because IC 13 defines and uses the term "person," IKE suggests that the policy also use the term "person" instead of "individual."

Attached to this letter are specific suggested language changes for the definitions of Class I and Class II violations. Thank you for your consideration of these comments, and please feel free to contact me with any questions.

Very truly yours,



Janet G. McCabe
Executive Director

cc: IKE Board
IKE Advisory Board

A. Class I Violations:

1. Violations which are immediately reviewed by the appropriate program Assistant Commissioner for referral to enforcement staff include any of the following:
 - a. Unauthorized preventable (negligent) discharge, failure to provide treatment, release or emission that results in **actual or potential** threat to human health or safety or which results in a serious **actual or potential** impact to the environment;
 - b. Individual **Persons** performing a regulated activity without the proper permit, license or certification that results in a threat to human health or the environment;
 - c. A determination of significant noncompliance (SNC) or high priority violation (HPV), under the water, air or hazardous waste programs;
 - d. Documented falsification of data, documents or reports;
 - e. Failure to respond to a Violation Letter where a response is required;
 - f. Denial of access to an Agency staff person to a regulated site; and/or
 - g. Other preventable violations not specifically identified above which result in **actual or potential** threat to human health or safety or which results in serious **actual or potential** impact to the environment.

B. Class II Violations:

1. Violations referred to enforcement staff, if not adequately addressed by the regulated entity after a Violation Letter/ request for information letter is sent and the violation was not corrected or the response not deemed appropriate by the respective program Assistant Commissioner include any of the following:
 - a. Unauthorized discharge, failure to provide treatment, release or emission, or threat of release or emission, that results in minor or ~~no~~ potential risk to human health or no serious harm to the environment;
 - b. ~~Individual performing a regulated activity without the proper permit, license or certification that does not result in a threat to human health or the environment;~~
 - b. Individual Persons** performing a regulated activity with the proper permit, license or certification, but not following all required practices, with the exception of asbestos work practice requirements; and/or
 - c. Late, incomplete or improperly completed data, documents, reports or compliance monitoring and assurance activities.**

A. Class I Violations:

1. Violations which are immediately reviewed by the appropriate program Assistant Commissioner for referral to enforcement staff include any of the following:
 - a. Unauthorized preventable (negligent) discharge, failure to provide treatment, release or emission that results in **actual or potential** threat to human health or safety or which results in a serious **actual or potential** impact to the environment;

- b. Individual Persons performing a regulated activity without the proper permit, license or certification that results in a threat to human health or the environment;
- c. A determination of significant noncompliance (SNC) or high priority violation (HPV), under the water, air or hazardous waste programs;
- d. Documented falsification of data, documents or reports;
- e. Failure to respond to a Violation Letter where a response is required;
- f. Denial of access to an Agency staff person to a regulated site; and/or
- g. Other preventable violations not specifically identified above which result in actual or potential threat to human health or safety or which results in serious actual or potential impact to the environment.

B. Class II Violations:

- 1. Violations referred to enforcement staff, if not adequately addressed by the regulated entity after a Violation Letter/ request for information letter is sent and the violation was not corrected or the response not deemed appropriate by the respective program Assistant Commissioner include any of the following:
 - a. Unauthorized discharge, failure to provide treatment, release or emission, or threat of release or emission, that results in minor or no potential risk to human health or no serious harm to the environment;
 - b. Individual performing a regulated activity without the proper permit, license or certification that does not result in a threat to human health or the environment;
 - c. b. Individual Persons performing a regulated activity with the proper permit, license or certification, but not following all required practices, with the exception of asbestos work practice requirements; and/or
 - d. c. Late, incomplete or improperly completed data, documents, reports or compliance monitoring and assurance activities.